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Mohamad Eliyas bin Suib v Public Prosecutor

B HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO KA-41H-3–01 OF 2020
ARIK SANUSI JC
7 MAY 2021

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant convicted for possession and self-administration of dangerous drugs — Whether prosecution proved prima facie case against appellant — Whether prosecution had proved weight of substance with accuracy and precision — Whether conviction was safe — Dangerous Drugs Act 1952 ss 12(2) and 15(1)(a)*

D

Evidence — Documentary evidence — Chemist's analysis of substance — No oral evidence for good condition of scale and computer used by chemist — Whether the digital scale and computer were in good working order — Whether failure to tender certificate of good working condition was fatal — Whether presumption could be invoked — Evidence Act 1950 s 90A

E

F This was the appellant's appeal against both conviction and sentence imposed by the learned sessions court judge on the appellant for two charges under the Dangerous Drugs Act 1952 (Act 234) ('the DDA'), that were under s 12(2) of the DDA which is punishable under s 39A(1) of the DDA and under s 15(1)(a) of the DDA, respectively. For the first charge, the appellant had been sentenced to 36 months imprisonment from the date of conviction ie 8 January 2020 and
G four strokes, and for the second charge, 12 months' imprisonment from the date of conviction and two years police supervision. Both imprisonment sentences were to run concurrently. Upon the appellant's application, the trial court had granted a stay of execution pending appeal and set bail at RM20,000. The appellant was charged under s 12(2) of the DDA which was punishable
H under s 39A(1) of the DDA before the sessions court on 13 August 2018. On 13 November 2018, the prosecution had amended the said charge (exh A) ('first charge') and tendered an additional charge (exh B) ('second charge') under s 15(1)(a) of DDA against the appellant. The appellant had claimed trial to both charges. During the prosecution's case, six witnesses were called to
I testify against the appellant. At the close of the case for the prosecution, applying the maximum evaluation test, the learned sessions court judge found that the prosecution had proved a prima facie case, as specified under s 180 of the Criminal Procedure Code ('the CPC'), against the appellant for both charges. Therefore, the appellant was ordered to enter his defence on both

charges. After the three options were put to the appellant, he chose to give his evidence under oath from the witness stand. The defence called two witnesses to testify in court. At the conclusion of the trial, upon a consideration of all the evidence adduced as prescribed under s 182A(1) of the CPC, the learned sessions court judge found that the appellant failed to cast any reasonable doubt as to the truth of the prosecution's case. Thus, the court was satisfied that the prosecution had successfully proved its case beyond reasonable doubt. Dissatisfied with the conviction and punishment imposed by the trial court, the appellant had appealed to the High Court against the whole decision of the learned sessions court judge. Hence, this appeal. The issues that arose in the appeal were as follows: (a) whether the prosecution had proved a prima facie case against the appellant for an offence under s 12(2) of the DDA which was punishable under s 39A(1) of the DDA at the close of the case for the prosecution; and (b) whether the prosecution had proved a prima facie case against the appellant for an offence under s 15(1)(a) of the DDA at the close of the prosecution's case.

Held, allowing the appeal against conviction and sentence:

(1) As the digital scale used by SP1 to weigh the substance of methamphetamine was an electronic device which had storage and display functions, the court was of the view that it was a 'computer' within the meaning of s 3 of the Evidence Act. Therefore, the chemist report that contained the weight of the substance of methamphetamine which was prepared by SP1 (exh P6) based on the data recorded, stored, processed, retrieved and produced by the digital scale and the computer used by SP1, was a 'document' within the meaning of the Evidence Act. In the present case, neither the person who was responsible for the management of the operation of both devices was called to testify in the court nor the certificate under s 90A of the Evidence Act was tendered as evidence in the court. In these circumstances, it was the view of the court that the presumption under s 90A(4) of the Evidence Act could not be invoked in favour of the prosecution (see paras 32–33 & 35).

(2) Since there was not one iota of evidence pertaining to the good condition of both devices when used by SP1, the prosecution had failed to prove one of the most important ingredients of the first charge that was the accurate weight of the substance of methamphetamine. Therefore, it was the finding of the court that pursuant to s 180 of the CPC and the authorities cited, no prima facie case had been made out by the prosecution against the appellant at the end of the prosecution's case. It was the opinion of the court that it was vital for the prosecution to prove the accurate weight of the drug substance in all drug cases as different weight would attract different degree of offences under the DDA, failing which it would be fatal to the prosecution's case. On this ground alone, the court was of the considered view that it was not safe to convict the

appellant on the first charge and therefore the court had allowed the appellant/appellant's appeal and ordered the appellant to be acquitted from the charge under s 12(2) of the DDA which was punishable under s 39A(1) of the DDA (see paras 36– 38).

(3) With regards to the second issue, it was the finding of the court that the prosecution had failed to establish a prima facie case against the appellant for an offence under s 15(1)(a) of DDA at the close of the case for the prosecution. According to the said charge, the appellant had administered to himself the dangerous drugs which are 'amp and methamphetamine'. However, upon scrutinizing Parts III and IV of the First Schedule of the DDA as provided for under s 15(1)(a) of the DDA, the court found that 'amp' was not specified as a dangerous drug under Parts III and IV of the First Schedule of the DDA. Since 'amp' was not specified as dangerous drug under Parts III and IV of the First Schedule of the DDA, the court found that the prosecution had failed to establish a prima facie case against the appellant under s 15(1)(a) of the DDA. To sum up, as the prosecution failed to prove a prima facie case against both charges, the appellant should be acquitted at the end of the prosecution case without his defence being called (see paras 39 & 41–43).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap sabitan dan hukuman yang dijatuhkan oleh hakim mahkamah sesyen yang bijaksana ke atas perayu bagi dua pertuduhan di bawah Akta Dadah Berbahaya 1952 (Akta 234) ('ADB'), yang mana di bawah s 12(2) ADB boleh dihukum masing-masing di bawah s 39A(1) ADB dan di bawah s 15(1)(a) ADB. Bagi pertuduhan pertama, perayu telah dijatuhkan hukuman penjara 36 bulan dari tarikh sabitan iaitu 8 Januari 2020 dan empat sebatan, dan bagi pertuduhan kedua, penjara 12 bulan dari tarikh sabitan dan dua tahun pengawasan polis. Kedua-dua hukuman penjara berjalan serentak. Atas permohonan perayu, mahkamah perbicaraan telah membenarkan penggantungan pelaksanaan sementara menunggu rayuan dan menetapkan jaminan RM20,000. Perayu didakwa di bawah s 12(2) ADB yang boleh dihukum di bawah s 39A(1) ADB di hadapan mahkamah sesyen pada 13 Ogos 2018. Pada 13 November 2018, pihak pendakwaan telah meminda pertuduhan tersebut (eksbibit A) ('pertuduhan pertama') dan mengemukakan pertuduhan tambahan (eksibit B) ('pertuduhan kedua') di bawah s 15(1)(a) ADB terhadap perayu. Perayu memohon dibicarakan bagi kedua-dua pertuduhan. Semasa kes pendakwaan, enam saksi telah dipanggil untuk memberi keterangan terhadap perayu. Di akhir kes bagi pihak pendakwaan, dengan menggunapakai ujian penilaian maksimum, hakim mahkamah sesyen yang bijakasana mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie, seperti yang dinyatakan di bawah s 180 Kanun Prosedur Jenayah ('KPJ'), terhadap perayu bagi kedua-dua pertuduhan. Oleh itu, perayu diperintahkan membela diri atas kedua-dua pertuduhan. Selepas tiga pilihan

tersebut dikemukakan kepada perayu, beliau memilih untuk memberikan keterangannya secara bersumpah dari kandang saksi. Pihak pembelaan memanggil dua saksi untuk memberi keterangan di mahkamah. Pada akhir perbicaraan, setelah menimbangkan kesemua keterangan yang dikemukakan seperti yang ditetapkan di bawah s 182A(1) KPJ, hakim mahkamah sesyen yang bijaksana mendapati bahawa perayu gagal menimbulkan sebarang keraguan munasabah tentang kebenaran kes pendakwaan. Justeru, mahkamah berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan munasabah. Tidak berpuas hati dengan sabitan dan hukuman yang dikenakan oleh mahkamah perbicaraan, perayu telah merayu kepada Mahkamah Tinggi terhadap keseluruhan keputusan hakim mahkamah sesyen yang bijaksana. Oleh itu, rayuan ini. Isu-isu yang timbul dalam rayuan adalah seperti berikut: (a) sama ada pihak pendakwaan telah membuktikan kes prima facie terhadap perayu bagi kesalahan di bawah s 12(2) ADB yang boleh dihukum di bawah s 39A(1) ADB pada akhir kes bagi pihak pendakwaan; dan (b) sama ada pihak pendakwaan telah membuktikan kes prima facie terhadap perayu bagi kesalahan di bawah s 15(1)(a) ADB pada akhir kes pendakwaan.

Diputuskan, membenarkan rayuan terhadap sabitan dan hukuman:

(1) Memandangkan penimbang digital yang digunakan oleh SP1 untuk menimbang bahan methamphetamine adalah peranti elektronik yang mempunyai fungsi penyimpanan dan paparan, mahkamah berpendapat ia adalah 'komputer' mengikut maksud s 3 Akta Keterangan. Oleh itu, laporan ahli kimia yang mengandungi berat bahan methamphetamine yang disediakan oleh SP1 (eksibit P6) berdasarkan data yang direkod, disimpan, diproses, diambil dan dihasilkan oleh alat penimbang digital dan komputer yang digunakan oleh SP1, adalah 'dokumen' dalam maksud Akta Keterangan. Dalam kes semasa, tiada orang yang bertanggungjawab untuk pengurusan pengendalian kedua-dua peranti dipanggil untuk memberi keterangan di mahkamah mahupun perakuan di bawah s 90A Akta Keterangan telah dikemukakan sebagai keterangan di mahkamah. Dalam keadaan ini, ia adalah pandangan mahkamah bahawa anggapan di bawah s 90A(4) Akta Keterangan tidak boleh digunakan memihak kepada pihak pendakwaan (lihat perenggan 32–33 & 35).

(2) Memandangkan tiada sekecil pun keterangan yang berkaitan dengan keadaan baik kedua-dua peranti apabila digunakan oleh SP1, pihak pendakwaan gagal membuktikan salah satu bahan terpenting dalam pertuduhan pertama iaitu berat tepat bahan methamphetamine. Oleh itu, ia adalah dapatan mahkamah bahawa menurut s 180 CPC dan otoriti yang digunakan, tiada kes prima facie telah dibuat oleh pihak pendakwaan terhadap perayu pada akhir kes pendakwaan. Ia adalah pandangan mahkamah bahawa ianya amat penting bagi pihak pendakwaan untuk membuktikan berat tepat bahan dadah dalam

kesemua kes dadah kerana berat yang berbeza akan menarik tahap kesalahan yang berbeza di bawah ADB, jika gagal, ia akan membawa kesan kepada kes pendakwaan. Atas alasan ini sahaja, mahkamah berpandangan bahawa adalah tidak selamat untuk mensabitkan perayu atas pertuduhan pertama dan oleh itu mahkamah telah membenarkan rayuan perayu dan memerintahkan perayu dibebaskan daripada pertuduhan di bawah s 12(2) ADB yang boleh dihukum di bawah s 39A(1) ADB (lihat perenggan 36– 38).

(3) Berkenaan dengan isu kedua, ia adalah dapatan mahkamah bahawa pihak pendakwaan telah gagal membuktikan kes prima facie terhadap perayu bagi kesalahan di bawah s 15(1)(a) ADB pada akhir kes untuk pihak pendakwaan. Mengikut pertuduhan tersebut, perayu telah memberikan kepada dirinya sendiri dadah berbahaya iaitu 'amp dan methamphetamine'. Bagaimanapun, setelah meneliti Bahagian III dan IV Jadual Pertama ADB seperti yang diperuntukkan di bawah s 15(1)(a) ADB, mahkamah mendapati bahawa 'amp' tidak dinyatakan sebagai dadah berbahaya di bawah Bahagian III dan IV Jadual Pertama ADB. Memandangkan 'amp' tidak dinyatakan sebagai dadah berbahaya di bawah Bahagian III dan IV Jadual Pertama ADB, mahkamah mendapati bahawa pihak pendakwaan gagal membuktikan kes prima facie terhadap perayu di bawah s 15(1)(a) ADB. Ringkasnya, oleh kerana pihak pendakwaan gagal membuktikan kes prima facie terhadap kedua-dua pertuduhan, perayu harus dibebaskan pada akhir kes pendakwaan tanpa dipanggil membela diri (lihat perenggan 39 & 41–43).]

Cases referred to

Abdullah bin Atan v PP and another appeal [2020] 6 MLJ 727, FC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1, CA (refd)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Nagappan a/l Kuppusamy v PP [1988] 2 MLJ 53, SC (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Chew Yoo Choi [1990] 2 MLJ 444; [1989] 3 MLRH 213, HC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 182A(1)
Dangerous Drugs Act 1952 ss 12(2), 15(1)(a), 39A(1), First Schedule, Parts III, IV
Evidence Act 1950 ss 3, 90A, 90A(4)

Pyara Singh a/l Dara Singh (Sukhdev Singh a/l Mohan Singh with him) (Andrew Paul & Assoc) for the appellant.
Aqharie Durranie bin Aziz (Deputy Public Prosecutor, Kedah Legal Advisor Office) for the respondent.

Arik Sanusi JC:

INTRODUCTION

[1] This is an appeal by the respondent against the decision of this court in allowing the appellant's appeal against both conviction and sentence imposed by the learned sessions court judge of Alor Setar on the appellant for two charges under the Dangerous Drugs Act 1952 (Act 234) ('the DDA'), that are under s 12(2) of the DDA which is punishable under s 39A(1) of the same Act and under s 15(1)(a) of the DDA, respectively.

[2] The respondent is the public prosecutor and the appellant is the accused in the court below. In this judgment, parties will be referred to as they were in the sessions court.

[3] For the first charge, the accused had been sentenced to 36 months imprisonment from the date of conviction (ie 8 January 2020) and four strokes, and for the second charge, 12 months imprisonment from the date of conviction and two years police supervision. Both imprisonment sentences are to run concurrently. Upon the accused's application, the trial court had granted stay of execution pending appeal and set bail at RM20,000.

FACTUAL BACKGROUND

[4] The accused was charged under s 12(2) of the DDA which is punishable under s 39A(1) of the DDA before the sessions court in Alor Setar on 13 August 2018. On 13 November 018, the prosecution had amended the said charge (exh A) ('first charge') and tendered an additional charge (exh B) ('second charge') under s 15(1)(a) of the DDA against the accused. The charges read as follows:

> Amended Charge
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> Bahawa kamu pada 05hb OGOS 2018 jam lebih kurang 3.35 PETANG, DI TEPI JALAN DI KAMPUNG KOTA RENTANG, MUKIM TITI GAJAH, ALOR SETAR, di dalam daerah Kota Setar, dalam Negeri Kedah telah didapati dalam MILIKAN kamu dadah berbahaya iaitu 'METHAMPHETAMINE' seberat 5.56 gram. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah sek 12 (2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah sek 39A (1) Akta yang sama.
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> Additional Charge

A Bahawa kamu pada 05hb Ogos 2018 jam lebih kurang 5.59 petang, di Pejabat Bahagian Siasatan Jenayah Narkotik, IPD Kota Setar, di dalam daerah Kota Setar, dalam Negeri Kedah, telah didapati memasukkan dalam diri kamu sendiri dadah berbahaya iaitu 'AMP DAN METHAMPHETAMINE'. Oleh yang demikian itu kamu telah melakukan suatu kesalahan di bawah sek 15(1)(a) Akta Dadah B Berbahaya 1952 dan boleh dihukum di bawah Seksyen yang sama.

[5] For ease of reference, ss 12(2) and 39A(1) of the DDA provide as the followings:

C Section 12 Restriction on import and export of certain dangerous drugs.

(1) ...

(2) No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this D Act or the regulations made thereunder.

(3) ...

(4) ...

E Section 39A Increased penalty where the subject matter is the prescribed amount of certain dangerous drugs.

(1) Every person found guilty of an offence against this Act where the subject matter of the offence is —

(a) ...;

F ...

(za) ...,

shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with G imprisonment for a term which shall not be less than two years but shall not exceed five years, and he shall also be punished with whipping of not less than three strokes but not more than nine strokes.

[6] Whilst s 15(1)(a) of DDA provides as follows:

H Section 15 Self administration.

(1) Any person who —

(a) consumes, administers to himself or suffers any other person, contrary to section 14 to administer to him any dangerous drug specified in Parts III and IV of the First Schedule; or I

(b) ...,

shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years.

[7] For the first offence, upon conviction, the accused is liable to be punished with imprisonment for a term which shall not be less than two years but shall not exceed five years, and shall also be punished with whipping of not less than three strokes but not more than nine strokes. A

[8] Whilst for the second offence, the accused is liable to be punished with a fine not exceeding five thousand ringgit or with imprisonment for a term not exceeding two years upon conviction. B

[9] The accused had claimed trial to both charges. C

[10] At the prosecution case, six witnesses were called to testify against the accused, that were Ahmad Hishahuddin bin Mohd Fuzi (chemist — SP1), D/Kpl Ezwan bin Daiman (photographer — SP2), Insp Muhamad Afandi bin Muzafa (arresting officer — SP3), Nurul Shuhada bt Shoib (pegawai sains kimia hayat — SP4), Sarjan Sharifah Norsheila bt Syaid Mohd (Investigating officer — SP5) and Kpl Mohd Rafizan bin Hamdan (police officer who sent the urine test bottle to the pathologist — SP6). D

[11] At the close of the case for the prosecution, applying the maximum evaluation test, the learned sessions court judge found that the prosecution had proved a prima facie case, as specified under s 180 of the Criminal Procedure Code ('the CPC'), against the accused for both charges. Therefore, the accused was ordered to enter his defence on both charges. E F

[12] After the three options were put to the accused, he chose to give his evidence under oath from the witness stand. The defence called two witnesses to testify in court, that were the accused (SD1) and Nor Shahabani bt Saad (SD1's wife — SD2) G

[13] At the conclusion of the trial, upon a consideration of all the evidence adduced as prescribed under s 182A(1) of the CPC, the learned sessions court judge found that the accused failed to cast any reasonable doubt as to the truth of the prosecution case. Thus, the court was satisfied that the prosecution had successfully proved its case beyond reasonable doubt. H

[14] Upon his guilt, the accused was sentenced to 36 months imprisonment from the date of conviction and four strokes for the first offence under s 12(2) of the DDA which is punishable under s 39A(1) of the DDA and 12 months imprisonment from the date of conviction and two years supervision for the second offence under s 15(1)(a) of the DDA by the learned sessions court judge. I

[15] Dissatisfied with the conviction and punishment imposed by the trial court, the accused had appealed to this court against the whole decisions of the learned sessions court judge. Hence, this appeal.

ISSUES TO BE DECIDED

[16] The issues that arose in this appeal are as follows:

(a) whether the prosecution had proved a prima facie case against the accused for an offence under s 12(2) of the DDA which is punishable under s 39A(1) of the same Act at the close of the case for the prosecution; and

(b) whether the prosecution had proved a prima facie case against the accused for an offence under s 15(1)(a) of the DDA at the close of the prosecution case.

FINDING AND DECISION OF THE COURT

First issue

[17] It is trite under criminal law that the legal burden always remains with the prosecution to prove a prima facie case against an accused person at the end of the prosecution case (see *Nagappan a/l Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53). The burden never shifts to the defence. This has been provided for under s 180 of the CPC which provides as follows:

> 180 *Procedure after conclusion of case for prosecution*
>
> (1) *When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.*
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) *For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.* (Emphasis added.)

[18] The law is settled on what is meant by a prima facie case. The Federal Court, through the pronouncement of the judgment of the court by Augustine Paul JCA (as he then was), in the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, has interpreted and elucidated the meaning of a *prima facie* case and the purpose of the enactment of s 180 of the CPC as

follows:

> [21] Section 180(1) *makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case* while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. *The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms*. The submission made must therefore be ratiocinated against the background of the meaning of the phrase 'prima facie case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. *A prima facie case is therefore one that is sufficient for the accused to be called upon to answer*. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:
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> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. *A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side*.
>
> [22] The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, *at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established*. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of ss 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. *The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out*. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. *If there is any such doubt there can be no prima facie case*. (Emphasis added.)

[19] In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Federal Court has clarified a prima facie case as the followings:

A For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) *the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused*;

B

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

C

(iii) after the defence is called, the accused elects to remain silent, then convict; and

D

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263. (Emphasis added.)

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[20] The meaning of a prima facie case has also been explained by Alauddin Mohd Sheriff PCA in the Federal Court case of *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 as follows:

F

> *The test at the end of the prosecution's case is 'prima facie case' based on a maximum evaluation of evidence*. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. *If the evaluation of the evidence results in doubts in the prosecution's case, then a prima facie case has not been made out. The defence ought not to be called merely to clear or clarify such doubts*. (Emphasis added.)

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[21] Further, in the Federal Court case of *Abdullah bin Atan v Public Prosecutor and another appeal* [2020] 6 MLJ 727, Tengku Maimun bt Tuan Mat CJ has endorsed the interpretation of a prima facie case given by Vincent Ng J in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 as the followings:

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> As to what constitutes 'a prima facie' case, the judgment of Vincent Ng J (as he then was) in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 is instructive. Although *Ong Cheng Heong* was decided prior to the amendment in 2006, we respectfully endorse His Lordship's views, at p 691 (MLJ); p 225 (CLJ):
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> I
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> > What then constitutes a 'prima facie case'? *'Prima facie' means on the face of it or at first glance*. ... perhaps the most appropriate definition of 'a prima facie case' could be found in the Oxford Companion of Law (p 987), which has it as: *'A case which is sufficient for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive'*. (Emphasis added). It would follow that there should be credible

> evidence on each and every ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected.

At p 691 (MLJ); p 224 (CLJ), His Lordship said:

> ... to me, maximum evaluation simply means evaluation, on a prima facie basis, of each and *every essential ingredient of the charge as tested in cross-examination*. In other words, *maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence*; with focus more on the evidential burden in terms of evidence led, rather than the persuasive burden in terms of qualitative degree of proof. (Emphasis added.)

[22] Based on the authorities cited above, a prima facie case succinctly means is the evidence adduced by the prosecution sufficient to convict the accused at the close of the prosecution case if he elects to remain silent. If the answer is no, the court shall acquit the accused without calling his defence.

[23] In this case, one of the essential ingredients of the first charge against the accused is the weight of the substance of methamphetamine. According to the charge sheet, it weighs 5.56g. Therefore, it is incumbent upon the prosecution to prove such weight with accuracy and precision at the end of the prosecution case, failing which no prima facie case has been made out against the accused.

[24] During the prosecution case, the learned defence's counsel had vehemently challenged the accuracy of the weight of the substance of methamphetamine through the evidence of the chemist (SP1). It was put to SP1 that the digital scale and the computer used to weigh the substance of methamphetamine and to conduct the GCMS and GCFID test were not in good working order, and the digital scale was not calibrated after being used many times by nine different chemists.

[25] Although SP1 was agreeable with the learned defence's counsel proposition that if the digital scale and the computer are in a good condition they can produce an accurate result, SP1 could not confirm whether both devices were in a good working order when they were used to weigh the substance of methamphetamine and to conduct the GCMS and GCFID test. SP1 also could not produce any calibration certificate and other proofs to confirm that both devices were in a good condition when they were used.

[26] The extract of SP1's evidence on this point is produced as follows:

Cross-Examination of SP1

PEGUAM — kamu tidak ada apa-apa bukti untuk tunjukkan alat timbang tersebut berfungsi dengan baik. setuju tidak setuju?

SP1 — saya mempunyai sijil kalibrasi.

PEGUAM — ya sijil kalibrasi itu lebih kurang 2 tahun yang lalu tapi *kamu tidak ada apa-apa untuk tunjukkan ia berfungsi dengan baik. setuju tak setuju?*

SP1 — *pada hari ini saya tidak ada*.

PEGUAM — dan juga ada lebih dari seorang ahli kimia yang menggunakan alat timbang tersebut. betul?

SP1 — setuju.

PEGUAM — *berapa ramai ahli kimia yang guna alat tu?*

SP1 — *lebih kurang 9 orang*.

PEGUAM — so akan ada *wear and tear*. *Jadi alat tu tidak akan tepat lepas satu masa sebab perlukan kalibrasi berulangan.* betul?

SP1 — *betul*.

...

PEGUAM — kamu tidak tahu sama ada komputer itu berfungsi dengan baik atau tidak, betul?

SP1 — tidak setuju

PEGUAM — *kamu ada apa-apa bukti untuk tunjukkan komputer itu berfungsi dengan baik*?

SP1 — *tidak ada*.

...

PEGUAM — *dan komputer ini juga digunakan oleh ahli kimia-ahli kimia yang lain*?

SP1 — *setuju*.

...

PEGUAM — soalan penggunaan GCMS. Soalan saya *tanpa penggunaan komputer tidak boleh kesan sama ada barang itu dadah atau tidak*?

SP1 — *betul tuan*.

PEGUAM — dan dalam Mahkamah tiada apa-apa bukti untuk tunjukkan *komputer yang mana kamu bergantung itu berfungsi dengan baik untuk berikan satu keputusan positif atau tidak. Betul?*

SP1 — *komputer saya tidak ada bukti untuk tunjukkan ia berfungsi dengan baik atau tidak.*

Re-Examination of SP1

TPR — tadi pihak pembelaan ada tanya untuk *ujian GCMS dan GCFID ada guna komputer dan jawab ya ada guna komputer dan kemudian pembelaan tanya komputer tersebut tak berfungsi dengan baik dan encik jawab tak setuju*, boleh jelaskan?

SP1 — minta maaf puan *saya bukannya pakar dalam IT so saya tak boleh tentukan*

komputer dalam keadaan baik atau tidak, namun untuk tentukan keputusan saya perolehi betul tidak, itu saya boleh bagi penjelasan. A

[27] In the case of *Public Prosecutor v Chew Yoo Choi* [1990] 2 MLJ 444; [1989] 3 MLRH 213, the High Court has acquitted and discharged the accused from the charge as there was no evidence that the gas chromatography instrument was in good condition when it was used. In his judgment, Faiza Tamby Chik JC has decided as follows: B

[16] *... There was no evidence that the gas chromatography instrument is in good working order before the tests and analyses were carried out in accordance with reg 27(1) Weights and Measures Act 1972*, which states: C

> It shall be the duty of the head of the department concerned to arrange for all weights, measures and instruments for weighing or measuring used by his department to be examined by the Inspector once in every year, and no such weight, measure or instrument for weighing or measuring shall be used unless it has been passed as fit for use and stamped during the current year. D

...

[29] Accordingly, I find the accused not guilty of the charge. I therefore acquit and discharge him without calling for his defence. (Emphasis added.) E

[28] Further, by virtue of s 90A of the Evidence Act 1950 (Act 56), for the admissibility of documents produced by computers, it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used. F

[29] By producing such certificate, the court shall presume that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced. G

[30] For ease of reference, s 90A of the Evidence Act provides as the followings: H

90A Admissibility of documents produced by computers, and of statements contained therein

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement. I

(2) *For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.*

(3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) *Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.*

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry, in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was —

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

[31] By virtue of s 3 of the Evidence Act, 'computer' and 'document' has been defined as follows:

3 *Interpretation*

In this Act, unless the context otherwise requires —

'computer' means an *electronic*, magnetic, optical, electrochemical, or *other data processing device*, or a group of such interconnected or related devices, performing logical, arithmetic, *storage and display functions,* and includes any data storage facility or communications facility directly related to or operating in conjunction

with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility;

'document' means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of —

(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

(b) any visual recording (whether of still or moving images);

(c) any sound recording, or any electronic magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;

(d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b), or (c),

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;

ILLUSTRATIONS

A writing is a document.

Words printed, lithographed or photographed are documents.

A map, plan, graph or sketch is a document.

An inscription on wood, metal, stone or any other substance, material or thing is a document.

A drawing, painting, picture or caricature is a document.

A photograph or a negative is a document.

A tape recording of a telephonic communication, including a recording of such communication transmitted over distance, is a document.

A photographic or other visual recording, including a recording of a photographic or other visual transmission over a distance, is a document.

A matter recorded, stored, processed, retrieved or produced by a computer is a document.

[32] From the above interpretation section, as the digital scale used by SP1 to weigh the substance of methamphetamine is an electronic device which has storage and display functions, this court is of the view that it is a 'computer' within the meaning of s 3 of the Evidence Act.

A **[33]** Therefore, the chemist report that contained the weight of the substance of methamphetamine which was prepared by SP1 (exh P6) based on the data recorded, stored, processed, retrieved and produced by the digital scale and the computer used by SP1, is a 'document' within the meaning of the Evidence Act.

B

[34] In this case, since SP1 cannot confirm in his testimony that the digital scale and the computer were in a good condition when they were used to weigh the substance of methamphetamine and to conduct the GCMS and GCFID test, unless the person who is responsible for the management of the operation C of both devices was called to give oral evidence in the court, it is incumbent upon the prosecution to tender the certificate under s 90A of the Evidence Act as evidence in the court in proving that the devices were in a good condition when used by SP1 in the course of their ordinary use (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, *Hanafi bin Mat Hassan v Public* D *Prosecutor* [2006] 4 MLJ 134 and *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1).

[35] However, in this case, neither the person who is responsible for the E management of the operation of both devices was called to testify in the court nor the certificate under s 90A of the Evidence Act was tendered as evidence in the court. In these circumstances, it is the view of this court that the presumption under s 90A(4) of the Evidence Act could not be invoked in favour of the prosecution.

F

[36] Since there is no an iota of evidence pertaining to the good condition of both devices when used by SP1, the prosecution had failed to prove one of the most important ingredients of the first charge that was the accurate weight of G the substance of methamphetamine. Therefore, it is the finding of this court that pursuant to s 180 of the CPC and the authorities cited above, no prime facie case had been made out by the prosecution against the accused at the end of the prosecution case.

H **[37]** It is the opinion of this court that it is vital for the prosecution to prove the accurate weight of the drug substance in all drug cases as different weight would attract different degree of offences under the DDA, failing which would fatal the prosecution case.

I **[38]** On this ground alone, this court is of the considered view that it is not safe to convict the accused on the first charge and therefore this court had allowed the appellant/accused's appeal and ordered the accused to be acquitted from the charge under s 12(2) of the DDA which is punishable under s 39A(1) of the DDA.

Second issue

[39] With regard to the second issue, it is the finding of this court that the prosecution had failed to establish a prima facie case against the accused for an offence under s 15(1)(a) of the DDA at the close of the case for the prosecution. The reasons are set out below.

[40] The second charge (exh B) against the accused is reproduced as follows:

> Bahawa kamu pada 05hb Ogos 2018 jam lebih kurang 5.59 petang, di Pejabat Bahagian Siasatan Jenayah Narkotik, IPD Kota Setar, di dalam daerah Kota Setar, dalam Negeri Kedah, telah didapati memasukkan dalam diri kamu sendiri dadah berbahaya iaitu 'AMP DAN METHAMPHETAMINE'. Oleh yang demikian itu kamu telah melakukan suatu kesalahan di bawah sek 15(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen yang sama.

[41] According to the said charge, the accused had administered to himself the dangerous drugs which are 'amp and methamphetamine'. However, upon scrutinizing Parts III and IV of the First Schedule of DDA as provided for under s 15(1)(a) of the DDA, this court finds that 'amp' is not specified as dangerous drug under Parts III and IV of the First Schedule of the DDA.

[42] Since 'amp' is not specified as dangerous drug under Parts III and IV of the First Schedule of the DDA, this court finds that the prosecution had failed to establish a prima facie case against the accused under s 15(1)(a) of the DDA.

[43] To sum up, as the prosecution failed to prove a prima facie case against both charges, the accused should be acquitted at the end of the prosecution case without his defence being called, as decided in *Mat v Public Prosecutor* [1963] 1 MLJ 263.

CONCLUSION

[44] In sum, in most drug cases under the DDA, the weight of the drug substance is one of the vital ingredients. Thus, in the absence of any oral evidence with regard to the good condition of the scale and the computer used by the chemist in weighing the drug substance, the certificate under s 90A of the Evidence Act becomes important and relevant to invoke the presumption under s 90A(4) of the Evidence Act. In such circumstance, the failure of the prosecution to tender the certificate under s 90A of the Evidence Act in the court will fatal the prosecution case as no prime facie evidence is established in regard to the good condition of the devices used and the accuracy of the weight of the drug substance.

[45] Hence, based on the reasons adumbrated above, this court answers the two issues in question as follows:

(a) the first issue — in the negative; and

(b) the second issue — in the negative.

Appeal allowed.

Reported by Nuzul Fitrie